Questions Presented

1. Whether counsel is required at the photographic display of a criminal accused, conducted while the accused is in custody and in the absence of compelling urgency; and if such right to counsel existed, can it ever be treated as harmless error.

2. Whether the totality of the circumstances resulting in the identification of the petitioner by the eye witness Davis denied the petitioners due process of law.

3. Whether a criminal defendant is denied due process of law under the principle enunciated in *Brady* v. *Maryland*, 373 U.S. 83, where, the prosecutor discloses a police report obtained the day following the alleged crime, containing statements of the eye witness that he did not see the perpetrator's face after the witness's direct testimony.

Statement

After a jury trial, petitioner was convicted in the Norfolk Superior Court of murder in the first degree in violation of Mass. Gen. Laws, Ch. 265, §1. Upon recommendation of the jury that the death sentence be not imposed, petitioner was sentenced to imprisonment for life. On appeal, the Massachusetts Supreme Judicial Court — after, according to Massachusetts procedure, reviewing the entire transcript and evidence (Mass. Gen. Laws Ch. 278, §33E) — unanimously affirmed the conviction. *Commonwealth* v. *Wilson*, 1970 Mass. Adv. Sh. 235 N.E. 2d 744 (1970)

The Commonwealth's evidence (the sufficiency of which petitioner does not challenge here) consisted mainly of eye witness testimony. The evidence, as fully reported in the opinion below, showed that on Saturday, May 11, 1968, Richard Webber, the victim, left the North Quincy Taxi Company where he was employed as a driver. He was

next seen by one Barbara Bennett, a waitress and bartender at the Quincy Lounge, Quincy, when she reported for work at 6:45 P.M. The defendant "came in" after Mrs. Bennett had gone on duty as the bartender. One Victor J. Barbati, an owner of the Quincy Lounge, arrived at the lounge "[b]etween eight and 8:30." Following Barbati's arrival, the defendant and Webber exchanged words, after which "they grabbed each other and . . . fell . . . to the floor. . . . Webber was on the floor on his back . . . [and the defendant] was on top of him." Barbati then went over to the two men "and tried to break . . . up" the fight. He "pulled" the defendant off Webber and "tried to . . . take him out of the bar." However, Webber "got up and charged towards . . . [the defendant], swinging at . . . [him]." The defendant then broke away from Barbati and the two men "started . . . fighting again." The fight was finally stopped and the defendant was "pulled . . . outside the door." In the interim Webber left the lounge and proceeded in the direction of "the North Quincy cab stand, Quincy Square."

On that same evening, one John A. Davis, the night dispatcher for the North Quincy Taxi Company "came to work" at 5 P.M. When Davis arrived, Webber was then at the office on "stand-by duty," waiting to see whether "he may have been needed to drive at night." Webber left the stand "between 6:00 and 6:30" P.M. The taxi company office was equipped with a two-way radio, a desk, a pair of telephones and other equipment. On the evening in question Davis, as was his custom, went out of the office and "screwed in" the light on the "left-hand side of the . . . building." Prior to 8:30 P.M. he noticed that the street lights were on and the lighting was "excellent." About 9 P.M. Webber "returned to the cab stand. . . . He looked nervous and afraid . . . his clothes were disarranged, and he had a couple of marks on him." After Webber entered the office,

he walked to the desk where Davis was sitting "picked up the phone . . . dropped . . . [it], and . . . was fumbling around with different objects on the desk." When Webber entered the office he left the door open and Davis observed the defendant approaching the building. After talking with Davis, Webber "stepped outside the cab stand." The defendant was then standing "about twelve or fifteen feet" from the office, when Webber left the building. Webber was "yelling, '[l]eave me alone, stay away from me, stay away from me, leave me alone.' " The defendant stepped up on the curb holding a forty-five calibre automatic in his hand. He had "the gun in around his chest area, . . . he pulled . . . [it] up . . . leveled it toward . . . Webber who was running, and he shot." Davis "ducked" under the desk after the shot was fired. As he arose he saw the defendant turn and run. Shortly thereafter Davis "went out and put . . . [his] sweater over . . . Webber." The cause of Webber's death was "a gunshot wound of the heart." A forty-five calibre bullet was removed from his "left front chest."

At the time the shooting occurred one Sean O'Brien, a driver for the taxi company, was also present at the office and his testimony substantially corroborated Davis's.

Argument

I. The Petitioner Claims Error In The Judge's Denial Of The Defendant's Motion To Suppress "The Identification Testimony" Of The Witnesses O'Brien And Davis.

In *U.S.* v. *Wade*, 388 U.S. 218 (1967) and *Gilbert* v. *California*, 388 U.S. 263 (1967) the Supreme Court held that a defendant's Sixth Amendment right to counsel applied to any 'critical stage' of a criminal proceeding, i.e.

wherever counsel is necessary to assure a meaningful defense. These cases dealt with post-indictment lineups. The test developed in *Wade* for determining such a 'critical state' at which counsel is required is "where counsel's absence might derogate from the accused's right to a fair trial." (P. 224).

Petitioner cites *Simmons* v. *U.S.*, 390 U.S. 377 in support of his claim that the pre-trial photographic display, in absence of counsel, to witness, Davis, was a denial of his Sixth Amendment right to counsel. However, the Supreme Court, as petitioner acknowledges did not reach the issue of right to counsel since the accused was at large at the time of the photographic identification. Petitioner implies, however, that the Court would sanction the use of photographic identifications in the absence of counsel *only* for the purpose of ". . .apprehending offenders and of sparing innocent suspects the ignominy of arrest. . ." (384). This Court, however, did not limit the use of photographic identifications in absence of counsel to the above two situations. While acknowledging the possibility of misuse of this identification procedure the Court held "We are unwilling to prohibit its employment, either in the exercise of our Supervisory Power or *still less*, as a matter of constitutional requirement. Instead, we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." (384).

Petitioner maintains that his contention that *Simmons* was meant to apply to photographic identifications of suspects in custody is reinforced by Justice Douglas' dissent in *Biggers* v. *Tennessee*, 390 U.S. 404 (1967). That

case is distinguishable. The suspect was shown individually to the victim who was told by the police that they wanted her "to look at a suspect." The identification took place seven months after the assault, which had occurred at night. The victim was unable to give more than a very general description of her assailant. Her daughter was unable to identify the defendant and the victim did not make a direct identification of the defendant in court. In the instant case the photographs were shown while the witness' memory was fresh and Davis was able to give an accurate description of the defendant's physical appearance and clothing before viewing the photographs.

The federal courts have declined to interpret *Simmons* as requiring counsel at photographic identifications made out of court.

"To require presence of counsel at out of court proceedings where the defendant is not present is to press the Sixth Amendment beyond any previous boundary." *U.S.* v. *Bennett*, 409 F.2d 888, 889 (2nd Cir. 1969) cert. den. 396 U.S. 852. The court further noted that in those cases in which the court held that counsel was required, none involved procedures in which the defendant was not present — where he could not be led into a 'trap.' Moreover, the 2nd circuit pointed out that there were other types of interviews with witnesses that afforded as much opportunity for suggestiveness as a display of photographs, in which the presence of opposing counsel was not required. In *U.S.* v. *Ballard*, 423 F.2d 127 (5th Cir. 1970) the defendant was in custody at the time of the photographic display. The court held that the Sixth Amendment did not apply to photographic identification regardless of whether the accused is in custody or not. "Neither *Gilbert* nor *Wade* through or outside *Simmons* require counsel for an accused be present at the time of an out of court photogra-

phic identification." Similarly, in *U.S.* v. *Conway,* 415 F.2d 158 (3rd Cir. 1969) the federal court held that where there was no form of confrontation, nor communication and where the defendant was not required to be present, *Wade* and *Gilbert* did not apply "since the pre-indictment photographic identifications were not a 'critical stage' of the proceedings where presence of counsel could meaningfully have preserved defendant's right to a fair trial." (162)

Therefore, respondent submits that the Sixth Amendment guarantee of right to counsel does not extend to photographic identifications and that even if presence of counsel is required, his absence is error harmless beyond a reasonable doubt. Those cases which have held that absence of counsel was prejudicial have involved quite distinguishable situations, i.e. *Hamilton* v. *Alabama,* 368 U.S. 52 (1961), where counsel was not present at arraignment where insanity defense must be pleaded or lost; and *Arsenault* v. *Mass.,* 393 U.S. 5 (1968) where counsel was not present at probable cause hearing and defendant pleaded guilty; which plea was offered into evidence at his trial. In these cases absence of counsel would most probably lead to the denial of a fair trial, but in the instant situation any improprieties in the procedure are open to review through cross-examination, which the petitioner had ample opportunity to explore and did explore.

II. The Procedures Involved In The Photographic Identification Were Not So Impermissibly Suggestive Or Conducive To Irreparable Mis-Identification As To Amount To A Denial Of Due Process.

Witness, Davis, who did not attend the lineup, was shown a photograph of the lineup on the evening of May 12, 1968. No identification was made. Later that night

Davis saw a television newsclip of an arrest for the shooting in which the petitioner was shown in handcuffs. A few days later two state police officers again showed him the lineup picture at his home. Davis made no identification. On May 19, 1968, Davis was again called to the police station where he was shown a front and side view of the petitioner alone. Davis did not identify the petitioner.

Finally, on May 24, 1968 Davis identified the petitioner at a probable cause hearing.

Davis testified at trial that his failure to identify the photographs was because he "was very much afraid of repercussions about this . . . for his family and himself." Respondent contends that viewed in the "totality of the surrounding circumstances", the identification procedures were not so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification." *Simmons*, supra, 384.

In *U.S.* v. *O'Connor*, 282 F.2d 963 (D.C. Cir. 1968) the court outlined some of the factors, including those stated by the Supreme Court in *Simmons*, to be considered in the determination of whether pre-trial 'confrontation' was impermissible. Were other persons so near to the scene of the crime that they could be confused with the suspect? Here, there is no evidence of such other persons. Nor, were any statements indicating guilt printed on the pictures. The defendant was not masked and the visibility was good. There is no evidence that the witnesses consulted with each other as to the identification of the defendant. Nor, does the evidence indicate that the police made any statements indicating their belief in the suspect's guilt.

Davis did not identify the picture because, as he testified, he was afraid; and under oath, he testified that he was sure of the identification of the defendant on May 11, 1968 — 8 days prior to being shown the 'face view'

photographs. Respondent urges that the procedures used did not constitute a denial of due process.

II.B Even If The Pre-Trial Identification Procedures Were Tainted, The In-Court Identification Of The Petitioner Is Admissible As Deriving From An Independent Source.

In *Wade*, supra the court held that the courtroom identification by a witness should not be held inadmissible because of improper pre-trial procedures until the Government had opportunity to present "clear and convincing" evidence that the in-court identification was based on an independent source. The test to be applied was set forth in *Wong Sun* v. *U.S.*, 371 U.S. 471, 488 (1963).

> "Whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." (P. 241)

The Court then outlined the factors to be considered in applying the test: Was there prior opportunity to observe the alleged criminal act? The witness in this case observed the defendant approaching the building. He saw him standing twelve to fifteen feet away. Street lights were on. He saw the defendant step upon the curb with a gun in his hand and saw him pull it up and level it at the defendant and shoot.

Was there a discrepancy in the witnesses pre-lineup description and the defendant's actual appearance? Davis accurately described the defendant's appearance and clothing. He testified that he saw the defendant's "full face" and that he had told the police he didn't get a good look

because he "was afraid." (See, also, *U.S.* v. *Clark,* 289 F. Supp. 610 (E.D. Pa. 1968).

Moreover, the defendant did not identify anyone else; and his failure to identify the defendant was a result of his fear for his family and himself. Finally, there was no appreciable lapse of time between his observation of the crime on May 11, 1968, and his identification of the defendant at the probable cause hearing on May 24, 1968.

Respondent submits that the witness' testimony establishes by 'clear and convincing evidence' that his in-court identification was based upon observations of the suspect other than the photographic display. *U.S.* v. *Wade,* supra; *Wright* v. *U.S.,* 404 F. 2d 1256 (1968). And, therefore, the in-court identification of the defendant was "purged of the primary taint" (*U.S.* v. *Wade,* supra 241) and was admissible. See *United States* v. *Butler,* —— F. 2d —— (C.A. 1, June 3, 1970).

III. The Report Of The Witness Davis Was Made Available To The Defendant.

The record is found in footnote 2 of the opinion of the Supreme Judicial Court. It reveals the following discussion:

The Court: "Do you want time to look them over before you start your cross-examination or not?" Counsel for the defendant. "Judge, I suppose I should." The Court: "Do you or not want time to look them over?" Counsel for the defendant. "Can I have a five-minute recess, please?" The Court: "I said do you want time. If you do, then I will rule." Counsel for the defendant. "Yes." The Court: "You want time?" Counsel for the defendant, "Yes." The Court: "All right." (End of bench proceeding.) The Court: "We will take a short recess, jurors, on account of the matter that just developed." (Recess.)

No further requests for extention of time were sought by the defendant.

Thus the statement sought was made available to the defendant at the conclusion of the witnesses direct testimony. This is consistent with the present practice in the federal courts. See 18 U.S.C., §3500 (b).

Nothing in *Brady* v. *Maryland* requires that a general request for all exculpatory evidence permits a defendant to obtain a complete copy of the government's file upon request.

In the instant case, nothing was suppressed. Moreover, the fact that the witness had at one time failed to identify the defendant "because of fear" was adequately explored. The "Davis Statement" (appended to the defendant's brief) also cannot be considered to be exculpatory. The report is the hearsay of a police officer as to what one eyewitness said in describing the defendant to the police. The statement adequately describes the defendant in height and build and specifically identifies the clothing. The statement "I didn't get a good look at his face" is not exculpatory as was the confession in *Feldon* v. *Rundle,* 410 F. 2d 1300, or the extrajudicial statements of the defendant in *Brady* v. *Maryland,* 373 U.S. 83, but can be considered as harmful to the defendant as it might be helpful. Moreover, unlike all the cases cited by the defendant this report was available after the direct testimony of the eyewitness. The prosecutor turned it over to the defense counsel when he realized that it might possibly be exculpatory. This is, therefore, not a suppression case as suggested by the defendant.

Since defendant made full use of the report, during the trial, the error, if any, is harmless beyond a reasonable doubt.

Conclusion

For the reasons stated in its brief the Commonwealth respectfully suggests that this petition be denied.

Respectfully submitted,

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